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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1972.

No. 72-1666.

PARAMOUNT FILM DISTRIBUTING CORPORATION,
Petitioner,

v.

STATE OF NEW YORK,
Respondent.

Reply Brief in Support of Petition for Certiorari.

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Petitioner's Brief in Reply to Respondent's Brief in Opposition to Certiorari.

Finality.

Contrary to the contention of respondent the judgment and opinion of the New York Court of Appeals decided nothing in any final fashion. This was an action for a certain sum of money—a claim for refund of motion picture license fees paid to the State under a film censorship statute subsequently held wholly unconstitutional. Until recovery was allowed, entirely denied or partly denied by an award of a lesser sum, no finality could attach. Instead the Court of Appeals merely laid down guidelines for a final determination by the Court of Claims and remanded the claim.

Inherent in that decision the Court of Appeals has itself certified that there was presented before it and necessarily passed upon by it a question under the constitution of the United States in that the Court of

Appeals adjudged that the fee payments not expressly made under protest were voluntary as a matter of law in the absence of prior resistence to payment by resort to judicial action.

This requirement of prior judicial action was imposed in spite of the circumstance that there was no single remedy and no single forum available in New York by which or in which petitioner could obtain a refund of the fees paid. The unavailability of a single adequate remedy and competent forum was expressly certified to this Court as posing a due process question under the Fourteenth Amendment to the Constitution of the United States but in rejecting dismissal of the entire claim for lateness, in that same decision, it was acknowledged that no cause of action for refund had accrued. Nevertheless, petitioner's recovery has been barred, for the voluntary payment as a matter of law theory, based only on petitioner's failure to sue on non-accrued causes of action.

The argument that the order of the New York Court of Claims entered February 13, 1973 finalized the decision of the Court of Appeals is equally without reason. That order appears as Exhibit B attached to the Petition for Certiorari (p. 26). It is merely an interim finding on consent of the amount of fees paid under express protest with direction to enter a judgment on that finding. No disposition whatsoever was made of the rest of the claim and until the principal part of petitioner's claim was dismissed by the judgment entered in the Court of Claims on March 13, 1973 (Exhibit E, p. 33) there had been no final determination as to which the petitioner was aggrieved. And both of these steps, it will be noted, were compelled or carried out by the petitioner in the absence of action by the State Attorney General.

The Federal Question.

The New York Court of Appeals has authoritatively ruled herein in amending its remittitur that State law required the bringing of at least two actions before two different courts in order to procure a declaration of invalidity as to the New York film pre-censorship law and then to procure a refund of the fees paid for such pre-censorship. The case cited by respondent (*Guaranty Trust Co. v. State of New York*, 299 N. Y. 292) holds nothing to the contrary. There the New York Labor Law imposed an excise tax on employers and within its related provisions (Section 570) authorized not only administrative and judicial challenge but also refunds. In *Matter of Bank of Manhattan Co. v. Murphy* (267 App. Div. 456, aff'd 293 N. Y. 515), a proceeding brought in accordance with that statutory authorization, the tax was held invalid and a refund directed. Guaranty Trust Company, claimant in the cited case, did not seek judicial review within the four months allowed but later filed a claim for refund in the Court of Claims, based, just as here, on the previous declaration of invalidity. The New York courts merely held that Guaranty Trust Company was not bound to seek refund under the judicial review proceeding authorized in the statute but could pursue a remedy in the Court of Claims based on that prior declaration of invalidity. The ultimate decision held, however, that, because Guaranty Trust Company had an adequate remedy under the Labor Law, its causes of action accrued upon payment of the tax and its claim was filed too late in the Court of Claims under the time limitation for filing claims.

In the present case, the Court of Appeals rejected dismissal for lateness, necessarily on the ground petitioner's cause of action did not accrue until the statute here involved was declared invalid because of the un-

availability of an adequate remedy before a competent forum.

It is an affront to the fair play sense of due process and equal protection to say that a suitor is barred from asserting his claim under a not yet accrued cause of action upon the ground that voluntary payments should be imputed from the failure to sue. The harm is accentuated when it is done pursuant to a striving to save some aura of validity to a pre-censorship statute already deemed wholly unconstitutional under the mandate of this Court and, when, unlike less affluent persons, petitioner is deprived of its statutory right to assert the non-voluntary nature of its fee payments through mistake of law, duress and business compulsion.

Raising the Federal Question Below.

In the posture of the State's preliminary motion in the trial court to dismiss the claim for lateness, the identical claims of denial of due process and equal protection under the Fourteenth Amendment to the Constitution of the United States were presented to the New York Court of Claims and the New York Supreme Court, Appellate Division, Third Department. (See excerpts from Briefs submitted to those counts attached hereto as Appendix 1 and Appendix 2.)

There the petitioner here argued that its claim could not be deemed to have accrued for any purpose but, of course, the argument was particularized to meet the thrust of the asserted bar of time limitations (*Atchafalaya Co. v. Williams Co.*, 258 U. S. 190; *Wilson v. Iseminger*, 185 U. S. 55, 62). The doctrine invoked, the points of argument that the authorities are the same with respect to the bar of time limitations and the bar of voluntary payment. It is just as much a denial of due process

to bar recovery on a claim for refund of fees on the ground of voluntary payment as it is for lateness where, because no cause of action had accrued for lack of a remedy and a forum, the petitioner never had a chance to assert its claim before the bar was imposed.

In its brief on the argument in the New York Court of Appeals, Paramount Film Distributing Corporation offered to, and did with the Court's permission, submit its brief before the Appellate Division (see excerpt from Petitioner's brief in the Court of Appeals attached hereto as Appendix 3.)

The Federal questions asserted here were, therefore, argued before and considered by all of the courts who heard and decided this matter below. The Court of Appeals certified that the question was presented to it and was necessarily passed upon by it.

CONCLUSION.

The petition for certiorari should be granted.

Respectfully submitted,

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Certificate of Service.

I hereby certify that on this day of , 1973 three copies of this Reply Brief were mailed, postage prepaid, to Honorable Louis J. Lefkowitz, Attorney General of the State of New York, the Capitol, Albany, New York, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Signed JOHN R. DAVISON
491 State Street
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APPENDIX 1.

Excerpt From Claimant's Brief in Opposition to the Preliminary Motion to Dismiss in the New York Court of Claims.

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Point IV.

Imposition of the bar of time limitations as urged by the State would be a denial of due process.

Until the decision of the Supreme Court in *Freedman v. Maryland*, 380 U. S. 51 (1965), any attack by claimant on the constitutionality of the scheme of censorship embodied in the New York Education Law and the fees imposed in connection therewith would have been futile. Not only had the Supreme Court of the United States, in its prior decisions, refused to hold the statutory scheme embodied therein unconstitutional, but the New York courts had specifically upheld the imposition of the fee schedule. (See, *supra*, pp. 2-3). Indeed even after the *Freedman* decision, and after the reversal by the U. S. Supreme Court in the *Trans-Lux* case, the New York Department of Education still took the position that the rationale of

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those cases did not invalidate the New York statute (*Mtr. of Ess Pee Bee Realty Corp. v. Regents*, 16 N. Y. 2d 536). It was not therefore, until the decision of the New York Court of Appeals in the *Trans-Lux* case, *supra*, page 18, that the assertion of a claim for refund could be considered anything but a futile gesture.

Badly stated, it is the position of the State of New York that at a time when no one could have known that a cause of action existed or asserted his rights thereunder, the statute of limitations destroyed any right of recovery. A rule of law based upon any such theory must necessarily deprive claimant of due process, in violation not only of the Fourteenth Amendment to the Federal Constitution but also the analogous provision of the Constitution of the State of New York. For it is well settled that a claimant may not be deprived of a cause of action by limitations unless it has been given a reasonable period of time within which to assert it. *Atchafalaya Co., v. William Co.*, 258 U. S. 190; *Wilson v. Iseminger*, 185 U. S. 55, 62; *Hastings v. Byllesby & Co. (Granberg)*, 293 N. Y. 413, 419 (1944); *People v. Cohen*, 245 N. Y. 419 (1927); *Halstead v. Silberstein*, 196 N. Y. 1, 15 (1909); *Gilbert v. Ackerman*, 159 N. Y. 118 (1899).

We respectfully submit that no cause of action for refunds could "accrue" until the decision of the Court of Appeals in *Trans-Lux*.

APPENDIX 2.

Excerpt From Claimant-Respondent's Brief in the Appellate Division, Third Department on the Appeal From the Order of the Court of Claims Denying the Motion to Dismiss.

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Point IV.

Imposition of the bar of time limitations as urged by the State would be a denial of due process and equal protection.

Until the decision of the Supreme Court in *Freedman v. Maryland*, 380 U. S. 51 (1965), any attack by claimant

on the constitutionality of the scheme of censorship embodied in the New York Education Law and the fees imposed in connection therewith would have been futile. Not only had the Supreme Court of the United States, in its prior decisions, refused to hold the statutory scheme embodied therein unconstitutional (See pages 34 to 38, *supra*), but the New York Courts had specifically upheld the imposition of the fee schedule (*Matter of Connection Co. v. Regents*, 17 A. D. 2d 671; *Pathe Exchange, Inc., v. Cobb*, 202 App. Div. 450, aff'd 236 N. Y. 539). Indeed, even after the *Freedman* decision, and after the reversal by the U. S. Supreme Court in the *Trans-Lux* case, the New York Department of Education still took the position that the rationale of those cases did not invalidate the New York statute (*Mtr. of Ess Pee Bee Realty Corp. v. Regents*, 16 N. Y. 2d 536). It was not, therefore, until the decision of the New York Court of Appeals in the *Trans-Lux* case (*Trans-Lux Distributing Corp. v. Board of Regents*, 16 N. Y. 2d 710), that the assertion of a claim for refund could be considered anything but a futile gesture.

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Baldy stated, it is the position of the State of New York that at a time when no one could have known that a cause of action existed or could have asserted his rights thereunder, the statute of limitations destroyed any right of recovery. A rule of law based upon any such theory must necessarily deprive claimant of due process, in violation not only of the Fourteenth Amendment to the Federal Constitution but also the analogous provision of the Constitution of the State of New York (Const. Art. 1, §6), for it is well settled that a claimant may not be deprived of a cause of action by limitations unless it has been given a reasonable period of time within which to assert it. *Atchafalaya Co. v. William Co.*,

258 U. S. 190; *Wilson v. Iseminger*, 185 U. S. 55, 62; *Hastings v. Byllesby & Co. (Granberg)*, 293 N. Y. 413, 419; *People v. Cohen*, 245 N. Y. 419; *Halstead v. Silberstein*, 196 N. Y. 1, 15; *Gilbert v. Ackerman*, 159 N. Y. 118.

The Federal and State Constitutions prohibit any other result.

APPENDIX 3.

Excerpts From Claimant-Respondent's Brief on the Appeal in the Court of Appeals.

VI.

(To cover points only raised below.)

Inasmuch as the position of the State seems radically to have changed in this court from the points argued upon the two appeals to the Appellate

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Division, a single copy of claimant's 3 briefs filed on those appeals is submitted herewith lest points not briefed herein be relied on by Appellant on the oral argument of this appeal. Since this is a civil appeal, however, appellant should be limited to the points argued in its main brief.

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(2) the appropriate statute of limitations for filing a claim does not commence to run until a cause of action accrues. That does not take place until claimant has an

adequate remedy before a court of competent jurisdiction and, therefore, the date of accrual here was June 10, 1965.

It is claimant's position, which has been adopted below, that neither the Supreme Court nor the Court of Claims had jurisdiction to provide a complete remedy in any action claimant might bring until after the offending statute had been declared void. The Supreme Court had power to declare the statute unconstitutional but no power to grant a refund of illegally exacted fees (*Matter of Adler, Inc., v. Noyes*, 285 N. Y. 34), and the Court of Claims had no equity jurisdiction to declare the statute void (*Psaty v. Duryea*, 306

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N. Y. 413). Until a remedy is available by a single action, no accrual occurs (*O'Hara v. State*, 112 N. Y. 146; *Hanger v. Abbott*, 73 U. S. 532, 541).